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NO. 82-425

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

STEPHEN A. McWILLIAMS,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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PROOF OF SERVICE

I hereby certify that on the 3rd day of November, 1982, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Robert L. Ketchand, BUTLER, BINION, RICE, COOK & KNAPP, 1100 Esperson Building, Houston, Texas 77002. All parties required to be served have been served. I am a member of the Bar of this Court.

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SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of November, 1982.

NOTARY PUBLIC in and for
Travis County, TEXAS

QUESTIONS PRESENTED

I. WHETHER THE EVIDENCE BEFORE THE TRIAL COURT RAISED DOUBT OF PETITIONER'S COMPETENCY SUFFICIENT TO REQUIRE IT TO CONDUCT A HEARING ON THE ISSUE?

II. WHETHER RETROACTIVE ABANDONMENT OF THE CARVING DOCTRINE BY THE TEXAS COURT OF CRIMINAL APPEALS CONSTITUTED AN EX POST FACTO LAW?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through her attorney, the Attorney General of Texas, and respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex parte Stephen A. McWilliams,* 634

S.W.2d 815 (Tex.Crim.App. 1982)(*en banc*), and is reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks review by certiorari of a judgment of the Texas Court of Criminal Appeals entered May 12, 1982, in appellate cause No. 64508 denying in part Petitioner's application for writ of habeas corpus. Petitioner's application for rehearing was denied on July 14, 1982. The petition for writ of certiorari was filed on September 13, 1982. Jurisdiction is proper under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, §10, cl. 1:

> No State shall . . . pass any ex post facto law . . .

U.S. Const. amend. XIV, §1:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

A. *Statement of Proceedings Below*

Respondent has lawful and valid custody of Petitioner pursuant to the judgments and sentences of the 23rd Judicial District Court of Fort Bend County, Texas, in Cause Nos. 10169 (aggravated robbery) (Tr. 4,5), and 10171 (aggravated kidnapping)(Tr. 4,5). On July 24, 1975, Petitioner, represented by competent counsel, voluntarily and knowingly waived his right to trial by jury and pleaded guilty to aggravated robbery, aggravated rape (cause number 10170), and aggravated

kidnapping. He was sentenced to imprisonment for thirty years on each count, to be served concurrently (Tr. 5). The convictions were not directly appealed.

Petitioner filed an application for a writ of habeas corpus in the trial court in 1979, alleging, among other grounds, that the trial court lacked jurisdiction to determine his competency to stand trial, and that his conviction of more than one offense arising out of the same transaction violated the carving doctrine. *See, Herera v. State,* 34 S.W. 943 (Tex.Crim.App. 1896), (Tr. 6,10). Counsel supplemented the petition[1] by alleging that the trial court failed to conduct a sanity hearing after the issue was raised.[2] (Tr. 14). Following a hearing on January 23, 1980, the trial court recommended that relief be granted in part, on the carving issue (Writ SF 28). The Texas Court of Criminal Appeals on original submission granted relief from conviction for aggravated rape, on the basis of a faulty indictment, 634 S.W.2d at 817, and on the conviction for aggravated kidnapping on the basis of a carving violation, *id.,* but upheld the trial court's action in regard to competency. *Id.* at 819-21. Both Petitioner and Respondent requested rehearing. On May 12, 1982, the appellate court granted the state's motion, abandoning the carving doctrine and reinstating Petitioner's conviction for aggravated kidnapping. *Id.* at 822-24. Petitioner's motion for a second rehearing was denied on July 14, 1982. *Id.* at 835. A petition for writ of certiorari to this Court followed.

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1. Although Petitioner includes excerpts from a "First Supplemental Petition for Writ of Habeas Corpus" in his appendix, this pleading is not included in the record.

2. The pleadings were orally amended during the writ hearing to refer to "competency" rather than "sanity." (Writ SF 26-27).

B. *Statement of Facts*

Petitioner robbed a convenience store in Fort Bend County, Texas, at gunpoint on March 20, 1975 (SX 4-8). He then abducted a female employee and took her to a deserted area, where his car stalled (SX 4,6). He forced her to commit sodomy and intercourse. She was able to escape after he fell asleep. *Id.* Petitioner was indicted for aggravated robbery, aggravated rape, and aggravated kidnapping (Tr. 2).

Dr. Benjamin Sher, a professor of psychiatry on the faculty of Baylor University College of Medicine, determined that Petitioner was competent to stand trial, after examining him at the request of the district attorney (SX 9). Dr. Sher's report was provided to the court at Petitioner's hearing on his guilty plea (SF 13). Petitioner responded intelligently to the lengthy examination of the trial court, giving no indication of contemporaneous incompetency (SF 4-35). Defense counsel informed the court that his client had the ability to cooperate in the preparation of the case and that Petitioner was competent (SF 15-16).

At Petitioner's state writ hearing, medical records from institutions in which Petitioner had been hospitalized and an affidavit from a Dr. Lucian T. Jones, who interviewed Petitioner more than four years after his trial, were produced (Writ DX 2-8). The Jones affidavit, which was not admitted at the hearing, opined that Petitioner had been incompetent during the criminal proceedings.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE EVIDENCE BEFORE THE TRIAL COURT DID NOT RAISE SUFFICIENT

DOUBT OF PETITIONER'S COMPETENCY TO REQUIRE IT TO CONDUCT A HEARING ON THE ISSUE.

The due process clause of the Fourteenth Amendment requires that, if raised by the evidence, the issue of competency to stand trial must be determined in a separate hearing apart from that held to determine guilt or innocence.[3] *Pate v. Robinson*, 383 U.S. 375 (1966); *see also, Drope v. Missouri*, 420 U.S. 162 (1975); *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir. 1979). To trigger this duty, the evidence of incompetency must be such as to raise a *reasonable doubt* of Petitioner's incompetency in the mind of the trial court. *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974). The court must have a reasonable doubt as to whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or whether he has a rational, as well as factual, understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960). This reasonable doubt must be raised by clear and convincing evidence. *Zapata v. Estelle*, 585 F.2d 750 (5th Cir. 1978)(*en banc*). Whether a competency hearing was mandated under the circumstances is addressed to the sound discretion of the trial court and will not be disturbed absent a demonstration that such discretion was abused. *Nathaniel v. Estelle*, 493 F.2d 794 (5th Cir. 1974). The mere presence of mental illness or other mental disability when an accused enters a plea of guilty does not trigger the necessity for a *Pate* hearing. *See, Bolius v. Wainwright*, 597 F.2d 986 (5th Cir. 1979). The trial court must be aware of a mental illness in a criminal defendant that is so debilitating that he is unable to consult with his lawyer and to understand the proceeding factually and rationally. *Id.*

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3. Petitioner does not here allege that he was in fact incompetent to stand trial. *See, Pate v. Robinson*, 383 U.S. 375 (1966).

Petitioner has not shown this. Although here the trial court was aware that Petitioner had previously been hospitalized for his mental problems, there was no evidence that Petitioner had any difficulty functioning outside institutional walls in the two and one-half years since he had left a New York institution, up until the conduct that led to his prosecution. (*See* SF 14). Experts and lay persons were in agreement that Petitioner was able to communicate with counsel and to comprehend the proceedings (SF 15-16, SX 9). Lay testimony is admissible to determine competence. *Bolius v. Wainwright, supra.* The trial court did not have before it the evidence presented at the writ hearing that (1) Petitioner had, more than three years before his prosecution, been deemed to be incompetent, and that (2) a professional who examined Petitioner four years after his trial deemed him to be incompetent, both during his guilty plea hearing and during his 1979 examination. *(See,* Writ DX 3,6). The trial court carefully questioned Petitioner as to his understanding of the proceedings and his psychiatric and institutional history, concluding after examination of a professional report and consultation with defense counsel that Petitioner was then competent (SF 4-16). The Fourteenth Amendment does not require a court to call in numerous experts until an evidentiary conflict is created, or to foresee future findings of incompetency. Based on the evidence before it, the trial court did not entertain the "real, substantial and legitimate doubt" of competency which is required for a *Pate* violation to be triggered. *See, Van Poyck v. Wainwright,* 595 F.2d 1083 (5th Cir. 1979); *Fitch v. Estelle,* 587 F.2d 773 (5th Cir. 1979); *Grissom v. Wainwright,* 494 F.2d 30 (5th Cir. 1974); *Bruce v. Estelle,* 483 F.2d 1031 (5th Cir. 1973); *Jackson v. Caldwell,* 461 F.2d 682 (5th Cir. 1972).

II.

THE WRIT SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The petition for writ of certiorari does not raise unsettled questions of law. The issues addressed concern nothing more than the manner in which well established principles of law should be applied to a unique factual situation. The state appellate court below carefully considered Petitioner's contentions before rejecting them. Even if this Court agrees with Petitoner's conclusion that a *Pate* hearing was called for, such a complaint is not a subject worthy of Supreme Court review. Petitioner has made no showing of widespread practice in Texas of misapplying this Court's pronouncements in regard to the requirement for holding competency hearings *sua sponte*. It is well established that this Court sits to decide important, novel, or recurring questions, not to correct alleged error or injustices in particular cases. This case represents nothing more than a trial court exercising its sound discretion as to a matter that this Court has recognized to be a subject of judicial control. The case here turns on its own facts, and it is not dependent on the deciding of any far-reaching federal questions. Although Petitioner introduced evidence of his mental illness not available to the court at trial, such is largely irrelevant because of its nondisclosure to the trial court at the crucial moment. The issue raised is whether the trial court abused its discretion in declining to conduct a more thorough hearing into Petitioner's competency, based on the evidence before it, *Pate v. Robinson, supra*, not based on evidence that may subsequently have been brought to its attention. The factual allegations are very similar to those raised in *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979). This case does not present a substantial federal question worthy of this Court's review.

III.

THE RETROACTIVE ABANDONMENT OF THE CARVING DOCTRINE BY THE TEXAS COURT OF CRIMINAL APPEALS DID NOT CONSTITUTE AN EX POST FACTO LAW.

An ex post facto law operates to punish conduct that, although lawful when done, has since become illegal through judicial or legislative action. *Garner v. Board of Public Works of City of Los Angeles,* 341 U.S. 716 (1951). An *unforeseeable* judicial enlargement of a criminal statute, applied retroactively, operates like an ex post facto law. *Marks v. United States,* 430 U.S. 188 (1977). The carving doctrine specified that, when more than one offense is committed in the course of a single continuous transaction, only one conviction could validly be obtained. *Herera v. State, supra.* It was not synonymous with the constitutional prohibition against double jeopardy, although it has been construed to be based in that provision. *Tatum v. State,* 534 S.W.2d 678 (Tex.Crim.App. 1976). Multiple prosecutions may be obtained in accordance with double jeopardy clause of the federal constitution, yet be violative of the carving doctrine. *See, Ex parte McWilliams, supra,* 634 S.W.2d at 822. The doctrine is merely a product of judicial construction which has been of difficult applicability. *Id.* at 822-24. It does not affect the amount of punishment imposed as a result of conviction of a criminal offense. Its abandonment is clearly not an ex post facto law.

When Petitioner was convicted of aggravated robbery, he was subject to imprisonment for five to ninety-nine years or life, a fine not exceeding ten thousand dollars, or both. Tex. Penal Code §§12.32, 29.03(b). He was subject to the same penalty upon conviction of aggravated kidnapping. Tex. Penal Code §§12.32, 20.04(b). Petitioner was sentenced to concurrent thirty-year sentences in each cause (Tr. 5). The decision of the Court of Criminal Appeals did not render any conduct

criminal that was lawful when committed. The applicable punishment range was not altered by the abandonment of the carving doctrine. The punishment was not altered; the only change is in the number of permissible convictions arising from one transaction. No ex post facto violation occurs when a change in the law is merely procedural and does not increase the punishment or alter the elements of the offense. *Weaver v. Graham*, _U.S. __, 101 S.Ct. 960 (1981); *Donald v. Jones*, 445 F.2d 601 (5th Cir.), *cert. denied*, 404 U.S. 992 (1971). A habeas corpus petitioner had no inherent right to be sentenced under the particular provisions in effect when he was indicted. *Breest v. Helgemoe*, 579 F.2d 95 (1st Cir), *cert. denied*, 439 U.S. 933 (1978).

Here the abandonment of the Texas carving doctrine was not unforeseeable. The State has requested the same in its motion for rehearing, and the concept had been severely criticized by commentators, *see* Steele, *A Review of the Jeopardy Defense in Texas*, 16 Tex. Tech. L. Rev. 393 (1981); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L.J. 503 (1949); and by members of the court itself. *See, Orosco v. State*, 590 S.W.2d 121 (Tex.Crim.App. 1979)(dissenting opinion on denial of State's motion for rehearing, J. Douglas). Using some of the numerous tests previously enunciated concerning carving, Petitioner's convictions for aggravated robbery and aggravated kidnapping could be allowed to stand, since the robbery was completed before the kidnapping commenced, *see*, SX 4,6; *Humphreys v. State*, 565 S.W.2d 59 (Tex.Crim.App. 1978), and because different evidence is required for each conviction, *id.; Ex parte Calderon*, 508 S.W.2d 360 (Tex.Crim.App. 1974). *Cf. Ex parte Evans*, 530 S.W.2d 589 (Tex.Crim.App. 1975)(whether both offenses are closely related crimes); *Ex parte Caldwell*, 537 S.W.2d 265 (Tex.Crim.App. 1976)(whether the offenses arose out of the smae transaction at the same time and place); *Ellis v. State*, 502 S.W.2d 146 (Tex.Crim.App.

1973)(whether the offenses are both violations of the same statute); and *Hancock v. State*, 495 S.W.2d 222 (Tex.Crim.App. 1973)(whether the indictments were returned on the same dates and listed identical named witnesses). Because of the inconsistent manner in which the doctrine has been applied by the courts, Petitioner, at the time he committed his offenses had no reasonable certain expectation that only one conviction could be carved from the events comprising the crime spree. *Humphreys v. State, supra; Ex parte Calderon, supra.* Since Petitioner is not subject to punishment for an act that was lawful when committed and he is not subject to an unforeseeable retroactive judicial enlargement of a criminal statute, the abandonment of the carving doctrine does not operate as an ex post facto law in its application to Petitioner.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of his contentions is needed; therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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